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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 5

CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL., *Appellants*,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., *Appellees*.

REPLY BRIEF FOR APPELLANTS.

ALLAN J. CARTER,
189 West Madison Street,
Chicago, Illinois,
Counsel for Appellants.

ALFRED R. BATES,
C. T. B. GOODSPEED,
KARL D. LOOS,
PRESTON B. KAVANAGH,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 713.

CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL., *Appellants,*

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., *Appellees.*

REPLY BRIEF FOR APPELLANTS.

At the oral argument of this cause on April 28, 1937, permission was granted to file this reply brief on or before May 1, 1937.

1. The argument that a financial emergency necessitated the adoption of the 1935 Amendment to the Miller Act is not only immaterial in this case but also misleading.

In their statement of facts (Brief, pages 6-9), appellees call attention to the existence in 1934 of a financial emergency which faced the Chicago Board of Education. They imply that this state of affairs was due in a measure to

the burdensome requirements of the Miller Act annuities payable to retired teachers. They also state that these retired teachers were receiving pensions under the Miller Act ($1500.00) and under a pension law of 1909 ($1000.00) which aggregated more than the maximum salaries received by active elementary school teachers. (Brief, pages 8, 51-52.) These figures with respect to maximum salaries are taken from the answer of the Board (R. 115), were not admitted by the reply (R. 151-154) and no proof was offered to support them.

We think that this point is not material to the only question in the case, which is whether or not appellants suffered an unconstitutional impairment of contract rights. This 1935 Act did not purpose to be emergency legislation and was passed after the close of the so-called depression. Nevertheless, it can be shown that the Miller Act annuities did not in fact constitute a crushing burden upon the taxpayers and that the 1909 pension fund entailed greater costs with smaller returns.

The 1909 pension law (Smith-Hurd Ill. Rev. Stats. 1929, Ch. 122, Pars. 178 and 183, secs. 155 and 158; R. 128) known as the Chicago Public School Teachers Pension and Retirement Fund Act, provided for an annuity of $800.00 per year after 25 years service and $1,000.00 per year after 35 years. It established a fund to which the teachers made small contributions, voluntary for those teaching prior to 1909 and compulsory for those entering the service after that date. The contributions ranged from $10.00 per year per teacher in service four years or less, to $50.00 per year after twelve years of service. Thus a teacher entering the school system in 1909 or thereafter would be entitled to receive $800.00 per year upon retirement in 25 years and would have contributed during that time, by compulsory deductions from salary, the sum of $850.00. The balance was to be raised by taxation or by transfer from the educational fund of the Board.

In the answer of the Appellee Board (R. 128-129) is an allegation that an independent audit showed that by 1930 this 1909 Pension Fund had incurred a deficit of $35,-851,000 which, if amortized over a period of 40 years, would require an annual tax levy of $2,523,000. In contrast to this it appears that the 1935 budget allowance for Miller Act annuities was $1,125,000.00 (R. 81). This budget appropriation of $1,125,000 was less than one per cent of the total 1935 budget of $187,270,890.97 (R. 82). Furthermore, this appropriation of $1,125,000 represented the peak load for Miller Act annuities since the 1935 amendment operated to reduce these annuities to $500 per year in the case of all future retirements. The appellants, who had retired or become entitled to retirement prior to the amendment constitute a rapidly diminishing class whose life expectancy as a group is short.

Under the allegations of its own answer, the financial difficulty of the Board was more directly attributable to the 1909 pension fund than to the Miller Act. The fund had a tremendous deficit but there was no deficit under the Miller Act because there was no fund but an annual tax levy. The relief said to be sought by the Board was secured to the legal limit by the 1935 amendment to the Miller Act which, without question, limited the annuities to $500.00 per year for those who sought to retire after the amendment became effective.

While the appellees would have this Court believe that the 1909 pension law, which is not involved in this case, is all the protection that appellants need or to which they are entitled, the record does not show how many of appellants participate in the benefits under that Act by voluntary election in the case of those teaching prior to 1909. The only witness testifying on this point (R. 185) had not brought himself within its provisions. The recent case of *Raines* v. *Board of Trustees Pension Fund,* 365 Ill. 610, cited and relied upon by appellees (Brief, pages 33-35) suggests that even those teachers who made compulsory contributions to

the 1909 fund may have their pensions cut after retirement at the will of the legislature.

2. Contributions by a teacher to a Retirement Fund are only one element of consideration for a contract. Such contributions are not necessary if other and sufficient consideration is present.

Appellees would have it that in order to establish vested contract rights to a pension or annuity, there must be contributions by the teacher. Appellees further insist that the mere fact of contribution is not enough but that the contributions must have been voluntary and not compulsory in order to confer vested rights. If this is true then neither the Miller Act here involved nor the 1909 Pension Fund Act in Illinois confer any enforceable rights on the retired teacher.

This we submit is an erroneous interpretation of the law of contracts. It needs no citation of authority to show that a State can offer a binding contract by a statute which contains no reservations. The offer is to a unilateral contract and the act requested of the offeree is in this case the act of retirement after a continuous period of teaching which, undertaken with the intent to accept the offer, creates a contract without more. *Williston on Contracts,* Revised Ed., Vol. I, Sec. 65.

The consideration required to support a unilateral contract is a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor. "Detriment" in testing the legal sufficiency of consideration, means giving up something which the promisee was privileged to keep or doing something which he was privileged not to do. "Benefit" must mean the receiving in exchange for the promise, some performance or forbearance, which the promisor was not previously entitled to receive. *Williston on Contracts,* Revised Ed., Vol. I, secs. 102, 102A.

Here the benefits to the promisor (the State) are plain. The Miller Act unloaded from the system a burden of

elderly teachers, which the Superintendent of Schools and Board of Education deemed highly desirable. (R. 51-52, 54.) At the same time it made places for younger teachers and held out a definite incentive to all those in the service to continue teaching and thus reduce an expensive turnover. All this could be accomplished at no great additional cost in the opinion of the Superintendent, the Board and its actuary (R. 64-70).

The detriment to the promisees (the teachers) is clear. They gave up active teaching positions at larger salaries (R. 184-187; 65, 66, 69) and, by retiring, performed an act which they were not theretofore compelled to do. Something is said by the appellees about the present insecurity of teacher tenure and of the right to teach. When the Miller Act was passed, both parties to this contract considered that the teachers had an absolute right to their positions derived from the Otis amendments of 1917 to the School Law providing that "appointments of teachers and principals shall become permanent," (quoted in full in our main brief, pages 59-61). See also the statement of the Superintendent of Schools at R. 51. If this view was in any way erroneous, it was a mere mistake of law and constitutes no ground for voiding a contract entered into in good faith by the parties.

There was a legal consideration here for the several contracts between the teachers and the State. It served to bind the parties as fully as though small amounts had been contributed by the teachers and large amounts by the State. The law, as set forth in our main brief, is clear that rights vest at the time of retirement and that the sufficiency of consideration will be tested as of that date. The presence or absence of contributions can be dismissed by saying that they are no more important than any other legal consideration and by reference to the universal rule that contributions vest no rights prior to retirement.

Appellants to the number of 162 were retired under the compulsory provisions of the Miller Act of 1926. The re-

maining 783 retired or sought to retire by voluntary action and to take advantage of the annuities offered by the Miller Act (R. 8-25, 93-105, 165-170, 206-255).

There can be no question that the second group performed every act required to signify acceptance of the offer made by the Act and that they successfully complied with its terms. As to the first group, whose retirement was compulsory, we submit that consideration is clearly present. They likewise have fully complied with all the requirements of the Miller Act.

The record is silent as to the exact dates of retirement of all these 162 appellants but it appears from the complaint that appellant Dodge retired February 1, 1927 at age 74; Armstrong retired January 23, 1929 at age 73; Coddington retired August 1, 1929 at age 72; Cook and Keen retired February 1, 1930, being respectively 70 and 72 years of age; Whigam retired February 1, 1931 at age 70; Toole retired February 1, 1931 at age 70; and Morse retired August 1, 1934 at age 70 (R. 14-16, 185, admitted in Answer, R. 122.)

All of these men and women, upon their retirement, waived their right to permanent teaching positions and thus incurred a detriment which constituted valid consideration for a contract. All of them continued to teach in the school system for some time after the passage of the Miller Act of 1926. They contributed their share of the required consideration for the annuities offered and satisfied the requirement that the extent of necessary service after the passage of the law was a matter for legislative and not judicial determination. *State* v. *Love,* 89 Neb. 149, 131 N. W. 196; *People* v. *Abbott,* 274 Ill. 380. The same view is expressed in *Retirement Board* v. *McGovern,* 316 Pa. 161, where the court said, pages 168, 172:

> "Many of these employees, from service and age, were entitled to and did retire shortly after the act's effective date by making but few payments as members of the system. * * *

> "To require all employees of a city, county or state to contribute for the entire length of time they were in service prior to the effective date of the act would be subversive of the proper purposes of the legislative undertaking. * * * Then, too, there is no legislative prohibition against the amount of the salary that shall be paid to such employee, or when it shall be paid, or the amount of adjusted compensation then to be provided for and paid in the future. This compensation may depend on a long or short service after the effective date of the Retirement Act, as the legislature sees fit."

It appears from a footnote to page 168 of the opinion in the *McGovern* case that the court was advised that employees who had received retirement pay of $275,341.76, actually contributed less than one per cent of that amount.

Our position is strengthened by the fact that the Illinois legislature was careful, in the Miller Act, to use only the words "annuity" and "annuities." These words taken in their ordinary accepted sense imply a yearly payment of money for an agreed term (as in this case for life) in return for a consideration received before the payments began.

If, as must be admitted, the right to annuities or pensions vests when the contract is made, there is nothing in the argument of the Supreme Court of Illinois in the instant case (R. 271) that unpaid installments of annuities are not within the terms of the contract and may be withheld at pleasure. Annuity contracts between private corporations and their employees are construed to give vested rights in unpaid installments where no contributions were made (*Schofield* v. *Zion's Cooperative Mercantile Institution*, 85 Utah 281, 39 Pac. (2d) 342, 96 A. L. R. 1083; *Psutka* v. *Michigan Alkali Co.*, 274 Mich. 318, 264 N. W. 385) and the rule should be the same as between a state and its employees. The appellants here have fully performed and are entitled to performance by the State, whose part of the contract remains to some extent executory. No question arises of a

depleted fund which would prevent performance. The annuities to be paid are raised as part of the general tax levy for educational purposes and the means to secure them are ready at hand.

3. A brief survey of the cases upon which Appellees rely.

(a) The decisions of this Court.

Appellees principal reliance is upon the cases of *Phelps and Askam* v. *Board of Education,* decided March 1, 1937, 299 U. S. ...., 57 Sup. Ct. Rep. 482. There an emergency measure passed by the New Jersey legislature permitted each local Board of Education to reduce teacher salaries within certain limits for the period of the school year July 1, 1933 to July 1, 1934. The reduction suffered by appellants in those cases was attacked as contrary to the provisions of tenure of teaching positions and guaranteed salaries said to be created by an earlier act.

This Court held that nothing was to be found in the record which indicated that the school board was bound by contract with the teacher for more than the current year. This holding alone should be sufficient to dispose of the comparison made between the *Phelps* case and the instant one.

Appellants here claim that the Act of 1917, known as the Otis amendments, and particularly Sec. 161 thereof, which appears at page 60 of our original brief gave them the security of permanent teaching tenure by the words:

> "No teacher or principal who has been or shall be appointed by said board of education shall (after serving the probationary period of three years specified in section 138 of this act) be removed except for cause"
> * * *.

The only case upon the subject so holds. *Armstrong* v. *City of Chicago,* 247 Ill. App. 584. But the actual existence of permanent teaching tenure is not so important as the fact that both the teachers and the Board of Education

considered that it existed at the time of the passage of the Miller Act. The giving up of the teaching positions and the act of retirement was thus a strong element of consideration for the annuities offered by the State of Illinois.

In the *Phelps* case the teachers had performed their obligation to teach throughout the school year and had received full compensation for that service. Appellants here had accepted the offer of the State and fully performed the obligations specified in that offer; but the State had, by 1935, only partially performed its promises and had paid only part of the consideration which it agreed to pay to the retired teachers *"annually and for life"*.

Appellees in their brief, pages 54-59, cite and discuss the cases of *Salt Mfg. Co.* v. *East Saginaw*, 13 Wall. 373; *Wisconsin and Michigan Ry. Co.* v. *Powers*, 191 U. S. 379; and *Stanislaus County* v. *San Joaquin C & I Co.*, 192 U. S. 201.

None of them, of course, purport to say that a State may not make a legislative contract with a private individual. Each one is authority for the proposition that no binding contract, impossible of amendment, will be implied from a legislative enactment which is offered indiscriminately to an unascertained class, especially where it involves the abdication of powers essentially governmental.

In the *Salt* case a bounty and exemption from taxation was offered to all persons and corporations who would bore for and manufacture salt within the State of Michigan. This Court held that such a statute was similar to a bounty offered for killing wolves, payable so long as the statute was in force but subject to repeal. It was "an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day." (13 Wall. 373, 377.)

The *Wisconsin and Michigan Railway Co.* case concerned a tax exemption offered for a period of ten years to railroads building lines north of a certain parallel. The opinion by Mr. Justice Holmes takes the view that the legislature was not making promises but framing a scheme of

public revenue and public improvement, which was addressed to the world at large and might be later repealed.

In *Stanislaus County* v. *San Joaquin,* a water company sought to retain in perpetuity a certain rate of return upon their invested capital which was provided as a minimum by a California statute of 1862. As in the preceding cases this Court was of opinion that the State had never intended to divest itself of the sovereign functions of rate making any more than it intended to abdicate the power to levy taxes.

In all of these cases the Court recognized that each party to the alleged contracts was engaged in a continuing course of operations. Insofar as these operations were completed prior to the repeal or modification of the statute granting special privileges, the appellants were entitled to those privileges. Beyond that they were not entitled. There is a marked difference between cases of this type and the instant case where one party, the teacher, has completely performed the act for which the offer is made. Other differences in the nature of the subject matter of the legislation and the possibility of definitely ascertaining the class to whom the offer was made are also apparent.

(b) The Illinois Cases.

Appellees rely upon the cases of *Beutel* v. *Foreman,* 288 Ill. 106, and *People* v. *Hanson,* 330 Ill. 79 (Brief, pages 24-29, 31-32), and *Raines* v. *Board of Trustees Pension Fund,* 365 Ill. 610 (Brief, pages 32-35).

The *Beutel* case and *People* v. *Hanson* both arise under the same statute and involve the same issue. There police officers who had completed the required 20 years of service sought retirement under a police pension fund act. One filed his application on March 31, 1917, and the other in April of that year. Before the pension board acted upon the application, the statute was amended by adding a minimum retirement age of 50, which neither Beutel nor Han-

son had reached. The amending act also carried a provision that no applications for retirement filed after March 1, 1917, were to be considered unless they met the age requirement. The decision in both cases was that the policemen were not entitled to retired pay or pensions.

We have no quarrel with these decisions. The amending act specifically prohibited consideration of the applications as filed and the retirement was never consummated. It does not appear that either policeman raised the question of whether or not the action of the Board in passing on the application was a ministerial one. In the present case, as to the 132 teachers who sought to retire and fulfilled all the requirements therefor but were prevented by the Board of Education, we have the express admission that the Board's action would have been purely ministerial (R. 256, 258).

In *Raines* v. *Board of Trustees Pension Fund, supra,* an act involving teachers' pensions in cities other than Chicago was under consideration. Under that act appellant had made certain contributions and became entitled to a pension upon his retirement in 1927. By an amendment of 1935 he deemed himself entitled to an additional pension of $200.00 per year upon payment of a lump sum of $200.00, which he offered. The Supreme Court of Illinois reversed the case and directed the payment of the additional pension.

The *Beutel, Hanson* and *Raines* cases all have language to the effect that a pension is a gratuity and the *Raines* case goes so far as to say that it is still a gratuity even though contributions are made, so long as the contributions are compulsory. None of the language to this effect in any of these decisions is germane to the points decided. In the *Raines case* the language of the opinion with respect to voluntary contributions is of interest as applied to appellants here, who parted with a different, but we think entirely adequate, kind of consideration. The Court said, 365 Ill. 610, 616-617:

"The relations between voluntary contributors and the sovereign being contractual, it follows that the rights created are not measured by the rights of pensioners. They are similar, and amount, in effect, to insurance contracts providing annuities upon maturity of the contract or policy of insurance. The basis of such annuities is the same as the basis of any other contract. The consideration is the offer of the sovereign, the acceptance of the offer and performance of its terms. It is a familiar principle that the legislature possesses all powers not prohibited by the limitations of the constitution. Among such powers is the power to contract, where the contract is not within any constitutional inhibition or against public policy. The right of the State to contract for the payment of annuities to its officers and employees under prescribed conditions is not challenged, and has been repeatedly upheld. * * * The benefits to be derived are not gratuities from public funds for past services, and therefore an increase in such benefits in consideration of further contributions does not violate the constitutional provision prohibiting extra pay for past services. The fact that the contributions may be smaller than the payments required by insurance companies under experience and mortality tables to mature policies for similar amounts does not detract from the contractual relation. The question of the wisdom of such rates is not within the province of the courts, but is a matter for the consideration of the legislature."

In our original brief, pages 43-52, we discussed at some length the Illinois cases and showed the confusion into which the Supreme Court of Illinois had fallen. In one line of cases a pension or annuity (no distinction is made by the Court between the two terms) is regarded solely as a gratuity, terminable at the will of the legislature. In another line of decisions which overlaps and on the whole is later than the first, the vesting of rights is recognized upon the retirement or death of the public servant.

It would be needless duplication to repeat the survey of the cases there made but we desire again to call atten-

tion to the last case before the decision in the case at bar, *De Wolf* v. *Bowley,* 355 Ill. 530 (1934). There a judge retired, having served more than 24 years. Sometime after his retirement he reached the age of 65 and brought suit against the County authorities under a judges pension act of July 1, 1919, applicable to judges of all courts of record to "receive annually a pension during the remainder of his life" equal to one-half his compensation for his last year of service. The pension was to be paid by State, County or City, respectively, out of moneys not otherwise appropriated, in the same manner as active salaries.

The judge in *De Wolf* v. *Bowley* made no contribution at any time to any pension fund. The Act of July 1, 1919, did not set up any fund and did not require any payments by the judges, during or after their terms of office. Nevertheless the Supreme Court of Illinois held that this judge was entitled to draw the pension, that it was not a gratuity and that, page 533:

> "Such pensions, generally, are not considered donations or gratuities but inducements to continued service".

We cannot reconcile the expressions in the Illinois decisions but we conclude that the reasoned view is that embodied in the quotation from *Roddy* v. *Valentine,* 268 N. Y. 228, 231, 232, which appears in our original brief pages 39-40. In that case there were compulsory but not voluntary contributions but their presence or absence was not a factor in the decision upholding contract rights. Nor have we discovered in the brief for appellees any reasoning which effectively answers or contradicts *Dillon on Municipal Corporations,* 5th Edition, Sec. 431, which has been widely cited and relied upon in the decisions. He says:

> "Until the particular event should happen upon which the money, or a part of it, is to be paid, there is no vested right in the officer to such payment. His interest in the fund is, until then, a mere expectancy

> created by the law and liable to be revoked or destroyed by the same authority. But when the particular event has happened upon which the money or a part of it is to be paid, the beneficiary of the pension under the pension system acquires, it has been held, a vested right and it is not competent for the legislature or any other authority to deprive him of that vested right. But the existence of a vested right is dependent upon statutory provisions conferring the pension without qualification and without any reserved right to terminate it. If the statute reserves the power to the local authorities to discontinue the pension in their discretion, the beneficiary does not acquire a vested right in it."

The cases cited in our main brief from eleven different states each definitely repudiates the gratuity theory as applied to a retirement annuity such as provided for in the Miller Act. In *Roddy* v. *Valentine, supra,* it was held by the New York Court of Appeals, "the concept embodied in the word pension has gone far beyond the original idea of a bounty or gratuity." In *McGovern* v. *Retirement Board, supra,* the Pennsylvania Supreme Court distinguished carefully between "retirement annuities" defined by them as "retirement pay" or "adjusted compensation" on the one hand and "gratuitous" pensions on the other. In *Klench* v. *Board of Pension Commissioners,* 79 Cal. App. 171, cited in the later California Supreme Court decisions on the subject, it is held as to those in the service at the time the statute was enacted, "the pension provisions became a part of the contemplated compensation for those services and was in a sense a part of the contract of employment itself." It necessarily follows from these views that, as stated in the *Roddy Case, supra,* where "the statutory conditions for retirement * * * have been met * * * the interest becomes vested and takes on the attributes of a contract". This doctrine applies to all of the appellants and under it they have each acquired contractual rights.

The conditions imposed and the offer extended by the Miller Act are expressed in clear positive language. Appellants, having complied with the requirements of that Act, we submit that such compliance by each constituted a contract with the State, the obligations of which could not legally be impaired by subsequent legislation. The rights of appellants to life annuities thereupon became vested property rights of which they could not legally be deprived.

Respectfully submitted,

ALLAN J. CARTER,
189 West Madison Street,
Chicago, Illinois,
Counsel for Appellants.

ALFRED R. BATES,
C. T. B. GOODSPEED,
KARL D. LOOS,
PRESTON B. KAVANAGH,
Of Counsel.